93-805

Supreme Court, U.S.
FILED
NOV 19 1993
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CHRISTOPHER WOLSKY,

Petitioner,

vs.

MEDICAL COLLEGE OF HAMPTON ROADS,
formerly known as Eastern Virginia Medical Authority,
formerly known as Norfolk Area Medical Center Authority,

Respondent.

Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

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PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

29 U.S.C. § 794 (1986) of the Rehabilitation Act ("the Rehabilitation Act") prohibits recipients of federal funding from discriminating against disabled persons. The Rehabilitation Act, like other antidiscrimination laws such as 42 U.S.C. § 1983 (1988) ("Section 1983"), does not contain a statute of limitations. Although the Fourth Circuit Court of Appeals applies Virginia's two-year statute of limitations for personal injuries to § 1983 claims, Almond v. Kent, 459 F.2d 200 (4th Cir. 1972), it applied the one-year statute of limitations contained in the Virginia Rights of Persons With Disabilities Act, Va. Code Ann. § 51.5-46(1990)("Virginia Disabilities Act") to Petitioner's Rehabilitation Act claim.

The questions presented are:

1) Whether federal interests in uniformity and certainty require application of the same limitations period to all federal civil rights claims including those brought under § 1983 and the Rehabilitation Act;

2) Whether actions brought under the Rehabilitation Act should be characterized as a matter of federal law for statutes of limitations purposes as actions for personal injury; and

3) Whether application of the one-year statute of limitations contained in the Virginia Disabilities Act to Rehabilitation Act claims serves the federal interests.

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formerly known as Eastern Virginia Medical Authority,
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Respondent.

Petition For Writ Of Certiorari To The
Fourth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner, Christopher Wolsky, by and through his counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, A-D) is reported at 1 F.3d 222. The opinion of the district court is reported at 795 F. Supp. 171.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1993. The petition for rehearing and suggestion for rehearing in banc were denied on August 24, 1993. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. §1981 (1988)

Title 42 U.S.C. §1983 (1988)

Title 42 U.S.C. §1988 (1976)

Title 29 U.S.C. §794 (1986)

Virginia Code Annotated Statutes §51.5-40 (1990)

Virginia Code Annotated Statutes §51.5-42 (1990)

Virginia Code Annotated Statutes §51.5-46 (1990)

STATEMENT OF THE CASE

Petitioner is a former medical school student at the Medical College of Hampton Roads ("the Medical School"). On April 23, 1992, Petitioner instituted this federal action pursuant to the Rehabilitation Act, 29 U.S.C. § 794 (1986)("the Rehabilitation Act"). The Complaint alleged that Petitioner was dismissed from the Medical School and denied readmittance because he has a neuroendocrine condition known as "Panic Disorder." Petitioner sought an immediate order of reinstatement to the Medical School and other relief.

Respondent moved to dismiss Petitioner's Rehabilitation Act claim, alleging that the statute of limitations had expired. Respondent asserted that since the Rehabilitation Act did not have a statute of limitations, the district court should apply the one-year statute of limitation that is contained in the Virginia Rights of Persons With Disabilities Act, Va. Code Ann. § 51.5-46 ("Virginia Disabilities Act").

Petitioner acknowledged that his Rehabilitation Act claim was not timely if it was subject to a one-year statute of limitations. Petitioner argued that this Court's decisions in Wilson v. Garcia, 471 U.S. 261 (1985) and Goodman v. Lukens Steel Company, 482 U.S. 656 (1987) dictate that Virginia's two-year Personal Injury statute of limitations prescribed in Va. Code Ann. Section 8.01-243(A) ("Personal Injury statute of limitations") applied to his Rehabilitation Act claim.

Following Wilson, Goodman, and the federal trend of courts that have confronted this issue, the district court held that a Rehabilitation Act claim is best characterized for statute of limitations purposes as a claim for injury to a person. It, therefore, applied Virginia's two-year Personal Injury statute of

limitations to Petitioner's Rehabilitation Act claim. Wolsky v. Eastern Virginia Medical Authority, 795 F.Supp. 171 (E.D. Va., 1992).

Respondent filed an interlocutory appeal under 28 U.S.C. § 1292(b) to the Fourth Circuit Court of Appeals claiming that the district court erred in applying the two-year Virginia Personal Injury statute of limitations. It reiterated the argument that the Virginia Disability Act contains the most appropriate statute of limitations for Rehabilitation Act claims. The Fourth Circuit agreed with Respondent and held that the Virginia Disability Act one-year statute of limitations, rather than the Virginia Personal Injury two-year statute of limitations, applied to Petitioner's Rehabilitation Act claim. Applying the one-year statute of limitations, the Fourth Circuit held that Petitioner's Rehabilitation Act claim was not timely. Wolsky v. Eastern Virginia Medical Authority, 1F.3d 322 (4th Cir. 1993).

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's decision below cannot be reconciled with the holdings of the Second, Fifth, Sixth, Seventh and Tenth Circuits. These circuits hold that the state personal injury statute of limitations applies to federal claims brought under the Rehabilitation Act. Morse v. University of Vermont, 973 F.2d 122, (2d Cir. 1992); Hickey v. Irving Independant School District, 976 F.2d 980 (5th Cir. 1992); Hall v. Knott County Board of Education, 941 F.2d 402 (6th Cir. 1991); Bush v. Commonwealth Edison Company, 990 F.2d 928 (7th Cir. 1993); Baker v. Board of Regents of State of Kansas, 991 F.2d 628 (10th Cir. 1993). Moreover, the Fourth Circuit's decision below is contrary to this Court's holdings in Wilson v. Garcia, 471 U.S. 261 (1985) and Goodman v. Lukens Steel Company, 482 U.S. 656 (1987). Finally, the decision below does not serve federal interests.

1. **The Decision Below Is Contrary To This Court's Decision In Wilson And Goodman And Is In Conflict With The Holdings Of Other Circuits.**

The Fourth Circuit's departure from the other circuits is due entirely to its failure to follow this Court's mandate in Wilson: that resort to state law should not take place until federal law is exhausted. Wilson, 471 U.S. at 262. This methodology is required by 42 U.S.C. § 1988 which directs the courts to look first to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." 42 U.S.C. § 1988 (1976)("Section 1988). Section 1988's direction to look first to federal law rather than state law applies to Rehabilitation Act claims.[1]

As this Court explained in Wilson, the first step in determining the applicable statute of limitations to apply to federal claims is to characterize the claim. Wilson, 471 U.S. at 260-261. The characterization of a federal claim is derived from the elements of the cause of action and Congress' purpose in providing it. These are matters of federal and not state law. Id.

Thus, Wilson reviewed various actionable violations of federal civil rights including discrimination claims and held that they should all be characterized as a matter of federal law as "personal injury" actions for purposes of selecting the state statute of limitations to be borrowed and applied. This approach was adopted to promote simplicity and uniformity in the enforcement of federal civil rights within each state.

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1. Section 505(a)(2) of the Rehabilitation Act provides that the "remedies, procedures, and rights," set forth in Title VI apply to Rehabilitation Act claims. 29 U.S.C. § 505(a)(2). In turn, statutory construction of Title VI claims is governed by § 1988. 42 U.S.C. § 1988 (1976).

Similarly, in Goodman v. Lukens Steel Company, 482 U.S. 656, 660 (1987) this Court reaffirmed Wilson's holding and expanded it to claims brought under 42 U.S.C. §1981. Id. In so holding, Wilson and Goodman flatly and explicitly rejected the approach of sifting through all of the extant state causes of action to select and apply the limitations period applicable to the specific state cause most precisely analogous to the conduct actionable under federal civil rights law. Wilson, 471 U.S. at 276, Goodman, 482 U.S. at 661.

2. **The Decision Below Undermines Federal Interests In Uniformity, Certainty And Minimization Of Unnecessary Litigation**

In not applying the personal injury statute of limitations to Petitioner's Rehabilitation Act claim, the Fourth Circuit completely disregarded the teachings of Wilson and Goodman. It skipped the crucial first step of characterizing the Rehabilitation Act claim as a matter of federal law. Had it done so the Fourth Circuit would have found, as had its sister circuits, that the claim is a part of the corpus of federal civil rights laws and is best characterized as an injury to the person. Morse v. University of Vermont, 973 F.2d 122, 127 (2d Cir. 1992); Hickey v. Irving Independent School District, 976 F.2d 980, 983 (5th Cir. 1992); Hall v. Knott County Board of Education, 941 F.2d 402, 409-410 (6th Cir. 1991); Bush v. Commonwealth Edison Company, 990 F.2d 928, 933 (7th Cir. 1993); Baker v. Board of Regents of State of Kansas, 991 F.2d 628, 630 (10th Cir. 1993). Armed with this characterization, the Fourth Circuit would have turned to state law only for the length of the personal injury statute. In doing so, it would have secured for Virginia plaintiffs the significant benefit mandated by Wilson and Goodman: the ability to look to one place to determine the limitations period applicable to all such federal civil rights claims.

By skipping the characterization step mandated by Wilson, the Fourth Circuit reverted to the pre-Wilson practice of searching for a precisely analogous state law claim. But the existence of a precisely analogous state discrimination claim is completely irrelevant,[2] just as, after Wilson, the existence of a precisely analogous state assault or battery claim is irrelevant. Rather, the proper course, the course which promotes uniformity and certainty, is that of characterizing the disability claim and grouping it with the other "personal injury" federal civil rights claims.

3. The Decision Below Does Not Serve Federal Interests Vindicated By The Civil Rights Laws.

Moreover, applying the state personal injury statute of limitations to all federal civil rights claims is consistent with Congress' instruction: state law shall only apply "so far as the same is not inconsistent with federal law." 42 U.S.C. § 1988. "The importation of the policies and purposes of the States on matters of civil rights is not the primary office of the borrowing provision in § 1988; rather, the statute is designed to assure that neutral rules of decision will be available to enforce the civil rights actions..." Wilson, 471 U.S. at 269.

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2. The Fourth Circuit justified its break with two of the other circuits on the grounds that these circuits could not consider applying a statute of limitations like the one contained in the Virginia Disability Act because the respective states had not enacted statutes forbidding discrimination against disabled persons. Morse v. University of Vermont, 973 F.2d 122 (2d. Cir. 1992); Hall v. Knott County Board of Education, 941 F.2d 402 (6th Cir. 1991). But this post hac factual distinction was not the basis for those decisions. Additionally, at least one other court, the Supreme Court of Georgia, has applied the personal injury statute of limitations to federal Rehabilitation Act claims notwithstanding the availability of a state discrimination law prohibiting discrimination on account of disability. Henrickson v. Sammons, et al., 263 Ga. 331, 434 S.E.2d 51 (1993).

Characterizing all federal civil rights claims including those brought under the Rehabilitation Act as personal injury actions minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by those laws. As this Court explained in Wilson, "[g]eneral personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today,..." and thus, "[i]t is most unlikely that the period of limitations applicable to such claims [personal injury] ever was, or ever would be, fixed in a way that would discriminate against federal claims, or be inconsistent with federal law in any respect." Wilson, 471 U.S. at 279.

By applying a limitations period contained in a state antidiscrimination law to the Rehabilitation Act, the Fourth Circuit imported into federal law state concerns and purposes. The Virginia Disabilities Act reflects a compromise between competing interests as is evident in the limitation of the recovery of back pay to six months. Va. Code Ann. § 51.5-46(B). Moreover, it is also telling that Virginia would afford its personal injury claimants two years to bring suit but relegate claimants under the Disability Act to a period of only one year. Both the limitation of back pay to six months and the one-year statute of limitations serve state concerns or policies, not federal interests.

There is no indication that Congress would sanction the importation of state policies or concerns into the Rehabilitation Act through the borrowing of a statute of limitations. As this Court noted in Wilson, it was the very ineffectiveness of state remedies that led Congress to enact the Civil Rights Acts in the first place. Wilson 471 U.S. at 279. Given that a similar motivation probably prompted the passage of the Rehabilitation Act, it is unlikely that Congress would have deferred to state concerns or policies had it set a limitations period for any of these civil rights claims.

Clearly, the broad remedial purpose of the Rehabilitation Act is vitiated by importation of parochial state concerns and interests through the borrowing of a statute of limitations. Yet, as a result of the Fourth Circuit's decision, in Virginia, the Rehabilitation Act is relegated to a level below other civil rights and personal injury claims.

The uniform characterization of all federal civil rights actions as personal injury actions serves the federal interests vindicated by those laws. The Fourth Circuit's decision to apply a one-year limitation to Rehabilitation Act claims but a two-year limitation to § 1983 claims undermines federal interests.

As a result of its failure to characterize Petitioner's Rehabilitation Act claim as a matter of federal law, the Fourth Circuit's decision below is in direct conflict with the holdings of the Second, Fifth, Sixth, Seventh and Tenth Circuits. The decision below is also contrary to this Court's mandate in Wilson and Goodman that resorting to state law should not be undertaken until principals of federal law are exhausted. Further, the decision below does not fairly serve the federal interests vindicated by the Rehabilitation Act. Because the issues presented in this petition are of recurring importance, not

only to Virginia plaintiffs but also to the hundreds of persons who file Rehabilitation Act claims each year,[3] they are worthy of review by this Court.

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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November, 1993

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3. Many states have enacted antidiscrimination statutes that prohibit discrimination on the basis of disability and permit aggrieved individuals to file suit in state court. Armed with the Fourth Circuit's decision below, it is likely that Rehabilitation Act respondents will erroneously assert that statutes of limitations contained in state antidiscrimination laws time bar federal Rehabilitation Act claims. The following state antidiscrimination laws contain statutes of limitations that are shorter than their personal injury statutes of limitations: compare Ga. Code Ann. § 34-6A-6(a) (1993)(180 days) with Ga. Code Ann. § 3-1004 (1964)(two years); compare Minn. Stat. § 363.06 (1992)(one year) with Minn. Stat. § 541.07 (1986)(two year); compare N.C. Gen. Stat. § 168A-12 (1992)(180 days) with N.C. Gen. Stat. § 1-52(1981)(three years) and N.C. Gen. Stat. § 1-54(3)(one year).

APPENDICES

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APPENDIX A

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Christopher Wolsky, *Plaintiff-Appellee*,	
v.	No. 92-2275
Medical College of Hampton Roads, formerly known as Eastern VA Medical Authority, formerly known as Norfolk Area Medical Center Authority, *Defendant-Appellant*.	

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
Henry C. Morgan, Jr., District Judge
(CA-92-319)

Argued: March 30, 1993

Decided: July 28, 1993

Before ERVIN, Chief Judge, and WIDENER
and HAMILTON, Circuit Judges.

Reversed and remanded by published opinion. Chief Judge Ervin wrote the opinion, in which Judge Widener and Judge Hamilton joined.

COUNSEL

ARGUED: Alfred James Johnston, POST & SCHELL, P.C., Philadelphia, Pennsylvania, for Appellant. Stephen Pollak, SHEA & GARDNER, Washington, D.C., for Appellee.
ON BRIEF: Sidney R. Steinberg, POST & SCHELL, P.C., Philadelphia, Pennsylvania, for Appellant. Linda D. Friedman, LENG, STOWELL, FRIEDMAN & VERNON, Chicago, Illinois for Appellee.

OPINION

ERVIN, Chief Judge:

The Medical College of Hampton Roads ("Medical College") appeals from an order entered by the district court denying its motion to dismiss. This is an interlocutory appeal, permission to appeal was granted under 28 U.S.C.A. § 1292(b), in which the Medical College raises one issue: whether the district court erred by applying the Virginia personal injury statute of limitations to the Federal Rehabilitation Act, 29 U.S.C. § 794. We hold that the district court did not apply the proper statute of limitations and reverse its decision.

I

Christopher Wolsky enrolled as a medical student at the Medical College of Hampton Roads in 1986. At the time he entered medical school, Wolsky suffered from a panic disorder. During Wolsky's first year at the Medical College, a resident diagnosed him as addicted to his panic disorder medication and ordered it changed. During his second and third years of

medical school, Wolsky's academic performance worsened in part due to the side effects of his new medication for the panic disorder. In May 1990 Wolsky was dismissed from the Medical College. He applied for readmission both in August 1990 and February 1991 and was denied readmission on both occasions.

In April 1992 Wolsky filed suit against the Medical College claiming discrimination in his dismissal and subsequent denials of readmission based upon his alleged disability under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (the "Rehabilitation Act"). Wolsky contends that his panic disorder is a disability under the Rehabilitation Act, and that the disorder's effects and complications resulted in his dismissal from the Medical College.

The Medical College filed a motion to dismiss Wolsky's complaint, alleging that the statute of limitations had expired. In its motion, the Medical College argued that since the Rehabilitation Act did not have a statue of limitations, the district court should apply the most analogous state statute of limitations. It believed that the most appropriate statute of limitations was that provided in the Virginia Rights of Persons with Disabilities Act, Va. Code Ann. § 51.5-40 to 46, (the "Virginia Act") which has a one-year statute of limitations. *See id.* The district court agreed that it should apply the most analogous state statute of limitations; however, it held that Virginia's statute of limitations for personal injury was more analogous than the Virginia Act's limitations period. Since the Virginia personal injury statute of limitations is two years, *see* Va. Code Ann. § 8.01-243(A), the district court held that Wolsky had filed the action in a timely manner. This appeal ensued.

Congress occasionally omits statutes of limitations in civil rights legislation and did so when it enacted the Rehabilitation Act. *Wilson v. Garcia*, 471 U.S. 261 (1984). In the event of such an omission, 42 U.S.C. § 1988(a) provides for the selection of an appropriate common-law statute of limitations, which is most applicable to the federal action.[1]

In *Wilson*, the Supreme Court addressed the issue of which state statute of limitations should be employed when the federal statute omits a statute of limitations. *Id.* at 268. The *Wilson* Court stated that the central issue was "the selection of `the most appropriate,' or `the most analogous' state statute of limitations to apply." *Id.* (footnotes omitted). The Court opined that section 1988(a) required courts to look to the most appropriate statute in each individual state, and noted that uniformity within the state was critical. The *Wilson* Court held

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1. Section 1988(a) provides in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district court by the provisions of this Title and of Title "CIVIL RIGHTS," ... shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of such civil ... case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause ...

42 U.S.C.A. § 1988(a).

that the section 1983 claim before it was most closely analogous to a "tort action for the recovery of damages for personal injury." *Id.* at 276. It found that the broad purposes of section 1983 and the variety of claims encompassed under it most closely resembled tort law.[2] The Supreme Court subsequently extended this reasoning to section 1981 claims in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987).

At the outset we note that the statute at issue in the instant case is neither section 1981 nor section 1983, but section 504 of the Rehabilitation Act. The Act states that no otherwise qualified individual shall be discriminated against solely by reason of his or her handicap in any program that receives federal funding. Since the Rehabilitation Act does not provide its own statute of limitations and 28 U.S.C. § 1658, the general federal statute of limitations is not applicable in this case, the district court must turn to state law for an appropriate statute of limitations.

This case offers us the opportunity to answer the question we left open in *Eastman v. Virginia Polytechnic Inst. & State University*, 939 F.2d 204 (4th Cir. 1991). There we concluded that the Rehabilitation Act neither provided for the award of compensatory damages for pain and suffering nor punitive

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2. The Fifth Circuit ably paraphrased the *Wilson* Court's test of when to apply a state statute of limitations under section 1988:

> (1) follow federal law if federal law provides a limitations period; (2) apply the common law as modified by state constitution or statute, if no limitations period is provided by federal law; (3) but apply state law only if it is not inconsistent with the constitution and laws of the United States.

Hickey v. Irving Indep. School Dist. 976, F.2d 980, 982 (5th Cir. 1992). We find this test instructive in the instant matter.

damages. *Id.* at 209. The district court had held that the statute of limitations found in the Virginia Act was the most similar statute to the Rehabilitation Act. We declined, however, to decide which was the most appropriate statute of limitations to apply to the Rehabilitation Act; we decided the case on the grounds that the Rehabilitation Act does not provide the damages the plaintiff sought. This case requires us to decide that issue squarely.

The Virginia Rights of Persons with Disabilities Act was modeled after and is almost identical to the Rehabilitation Act. The Virginia Act prohibits discrimination on account of handicap status in any program receiving state funding. The Virginia Act's language tracks the Rehabilitation Act's language almost precisely. It, however, contains a one-year statute of limitations for filing an action.

Given that the Virginia Act is patterned after the Rehabilitation Act, the district court should have applied the statute of limitations found in the Virginia Act rather than the personal injury statute of limitations. *Wilson* requires district courts to look to the most appropriate state statute of limitations. We have held that federal courts should follow the limitations period set by the state in which the district court sits. *Almond v. Kent*, 459 F.2d 200, 203 (4th Cir. 1972) (*citing O'Sullivan v. Felix*, 233 U.S. 318 (1914)).

The district court, however, attempted to follow the precedent of the other courts that have addressed this issue. *See Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 983 (5th Cir. 1992); *Morse v. University of Vermont*, 973 F.2d 122, 127 (2nd Cir. 1992); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 409-10 (6th Cir. 1991). The reasoning in those cases was similar; the Rehabilitation Act is an anti-discrimination statute similar to section 1983 or Title VI of the Civil Rights Act of

1964. In those circuits the personal injury statutes were applied because Rehabilitation Act claims are injuries to individuals and analogous to personal injury claims.

Morse and *Hall* are readily distinguishable from the instant case on the grounds that the respective states had not enacted statutes forbidding discrimination against disabled persons or similar statutes. Those courts, on the one hand, could not consider applying a statute of limitations found in a state statute which had been modeled on the Rehabilitation Act. Virginia, on the other hand, seemingly intended its legislation to track the federal Act and provide its citizens with the same rights and remedies. The Virginia Act states

> The Department for Rights of Virginians with Disabilities shall promulgate such regulations as may be necessary to implement this section. Such regulations shall be consistent, whenever applicable, with regulations imposed under the Federal Rehabilitation Act of 1973 ...

Va. Code Ann. § 51.5-43. Both statutes prohibit discrimination against handicapped persons by entities that receive either state or federal funding *Id.*. at § 51.5-40 and 29 U.S.C. § 794. Portions of the Virginia Act directly quote from the corresponding sections of the Rehabilitation Act. Both the Rehabilitation Act and the Virginia Act afford only equitable remedies. Applying the Virginia Act's statute of limitations is consistent with the mandates of *Wilson* and *Goodman*.

Only in *Hickey* did a court have the opportunity to apply a statute aimed at ending discrimination based on handicapped status. *Hickey*, 976 F.2d at 982. There the court noted, however, that "[t]he Texas statute which prohibits discrimination against handicapped persons and creates a civil cause of action for redress of such discrimination does not

contain a limitations period." *Id.* at 982-83 n.3. Therefore, it had to look to another statute. In a footnote the *Hickey* court examined numerous possible applicable statutes of limitations before deciding to use the one contained in the Texas personal injury statute. *Id.* In the instant action the district court should have looked no further than the Virginia Act.

The district court drew an analogy between this action and a Title VI action. Since Title VI has no statute of limitations, the court extended the analogy to section 1981 and 1983 actions. The district court's reasoning overlooked the fact section 1983 actions cannot have parallel state law provisions. Therefore, district courts have to look to more general statutes and their limitations periods. The *Wilson* Court noted that

> [b]ecause the § 1983 remedy is one that can "override certain kinds of state laws" and is, in all events, "supplementary to any remedy any State might have," it can have no precise counterpart in state law. Therefore, it is the "purest coincidence" when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect.

Wilson, 471 U.S. at 272 (citations omitted). Given that a section 1983 action does not have a counterpart in state law, a general personal injury statute of limitations may be appropriate. *Wilson* acknowledged that minor differences between state and federal statutes are acceptable and the most analogous statute need not be identical. *Id.* In the instant matter, however, the Rehabilitation Act does have an exact state law counterpart.

Wolsky contends that the exact counterpart or most similar state statute analogy is not appropriate, but fails to demonstrate precisely how it is inappropriate. He argues that even if the exact counterpart analysis is correct, the Virginia Act exempts some discrimination that the federal law permits and therefore that the Virginia Act is not an exact counterpart. We find the distinctions between the two statutes are not significant enough to decline applying the statute of limitations as set forth in the Virginia Act.

III

Given that the Virginia Act is modeled after the Rehabilitation Act, we break with the conclusions of the other circuits to apply a personal injury statute of limitations. *See Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 983 (5th Cir. 1992); *Morse v. University of Vermont*, 973 F.2d 122, 127 (2nd Cir. 1992); *Hall v. Knott County Bd. of Educ.*, 941 F.2d 402, 409-10 (6th Cir. 1991); *Andrews v. Consolidated R.R. Corp.*, 831 F.2d 678, 683 (7th Cir. 1987). The Virginia Act is the most analogous statute, and its statute of limitations is applicable. Therefore, the decision of the district court is reversed and the case is remanded to the district court with instructions to dismiss Wolsky's claim.

REVERSED AND REMANDED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

CHRISTOPHER WOLSKY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil No. 2:92cv3119
	)	
EASTERN VIRGINIA MEDICAL AUTHORITY, formerly Norfolk Area Medical Center Authority and now MEDICAL COLLEGE OF HAMPTON ROADS,	)	
	)	
Defendants.	)	

OPINION & ORDER

Procedural History

On April 23, 1992, Christopher Wolsky (hereafter "PLAINTIFF" or "WOLSKY") filed a complaint in this court demanding trial by jury on his allegations in Count I that the Eastern Virginia Medical Authority (a/k/a Medical College of Hampton Roads) (hereafter "DEFENDANT" or "MEDICAL SCHOOL") discriminated against him in violation of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. Section 794) (hereafter "REHABILITATION ACT") and in Count II that the Medical School breached its contract with him. In response, on June 11, 1992, defendant moves this court to dismiss Count

I of plaintiff's complaint pursuant to Fed.R.Civ.P. 12(b)(6) as a matter of law or, in the alternative, to strike plaintiff's claim for compensatory and punitive damages, as well as his jury demand, under Count I. Defendant further moved this court for a more specific pleading and to strike plaintiff's claim for punitive damages and compensatory damages arising from plaintiff's alleged emotional distress under Count II. The parties have fully briefed the issues presented by defendant's motion and the motion is now ripe for decision.

Facts

In considering a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, every allegation of the complaint must be taken as admitted by the defendant. Tahir Erk v. Glenn L. Martin Co., 116 F.2d 865, 867 (4th Cir. 1941). An examination of plaintiff's complaint in this case reveals the following facts:

1) The Medical School receives financial assistance from the United States Department of Education, making it subject to Section 504 of the Rehabilitation Act; plaintiff is a qualified handicapped person under the Act with respect to postsecondary education.

2) Plaintiff, at the age of 20, was diagnosed as having a hereditary neuroendocrine condition known as "Panic Disorder." Following his diagnosis, plaintiff completed his pre-medical studies and scored well enough on an entrance examination to qualify for admission to the Medical School. Plaintiff successfully completed his firs year at the Medical School.

3) In January of 1987, plaintiff opted to receive treatment for his condition from a resident in training at the Medical School. The resident determined that plaintiff was addicted to Benodiazepine, the medication he took to control his condition. In response to a threat from the resident that she would tell the administration of the Medical School that plaintiff was a "Benodiazepine addict," plaintiff withdrew from the use of Benodiazepine and began taking an alternate medication prescribed by the resident.

4) After the change in medication, plaintiff developed severe insomnia, ataxia, slurred speech, daytime drowsiness and double vision, among other symptoms.

5) Plaintiff's second year grades declined substantially from those of his first year. After failing a ten (10) day course in January of 1988, plaintiff was told that he would have to repeat his second year. At some point, plaintiff related the resident's threats and the change in his medication to the Medical School's Progress Committee; he was subsequently given a Fellowship in the Pharmacology Department and able to successfully complete his second year.

6) During his third year, plaintiff continued to suffer from insomnia related to the resident's treatment of him. Plaintiff passed all but one of his third-year classes. Plaintiff was not allowed to repeat this class and was, subsequently, dismissed from the Medical School.

7) In both August of 1990 and February of 1991, plaintiff requested but was denied readmittance to the Medical School. At the times of his dismissal and requests for reinstatement, plaintiff met the academic and technical standards for readmission to the Medical School.

Discussion

A. Count I

In weighing the validity of a motion to dismiss for failure to state a claim upon which relief can be granted, the duty of the court is to consider whether, in the light most favorable to the plaintiff, the complaint is sufficient to state a valid claim for relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Tahir Erk, 116 F.2d at 869. In the present case, defendant argues that Count I of plaintiff's complaint must be dismissed as a matter of law because it is time-barred by the applicable statute of limitations.

The Rehabilitation Act does not contain a provision specifying a controlling statute of limitations. Neither the Supreme Court, the Fourth Circuit, or a court of this District has addressed the question of what specific statute of limitations controls a claim under the Act. The Supreme Court has held, however, that where a federal civil rights statute does not contain a statute of limitations, "federal courts should select the most appropriate or analogous state statute of limitations." Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987). In both Wilson v. Garcia, 471 U.S. 261 (1985) and Goodman, the Supreme Court held, respectively, that simple, broad characterizations of all §1983 and §1981 claims, rather than case by case analyses of the particular facts and form of action presented in each case, best fit the remedial purposes of those statutes. In rejecting the case by case approach, the Court sought to prevent counsel from arguing that two (2) or more periods of limitations should apply to each federal claim, to prevent the application of different statutes of limitation within a single state for the same federal claim and to prevent multiple periods of limitations from applying to the same case. To that end, then, the Court went on to hold in both cases that the

respective state statutes of limitation application to personal injury actions should apply to all claims brought under §1983 and §1981 (rather than potentially more analogous, more specific statutes of limitation available in a particular case).

The Medical School argues that the most "appropriate or analogous" state statute of limitation in the present case is that contained in the Virginia Rights of Persons With Disabilities Act, Va. Code Ann. Sections 51.5-40 et seq., as amended (hereafter "VIRGINIA ACT").[1] In support of this position, defendant relies on Eastman v. Virginia Polytechnic Institute and State University, 732 F.Supp. 665 (W.D.Va. 1990) affirmed on other grounds 939 F.2d 204 (4th Cir.1991).

In Eastman, Chief Judge Turk of the Western District of Virginia held that since the Virginia Act is patterned to be consistent with the Rehabilitation Act, the Virginia Act is the most analogous state statute and, accordingly, must be applied to actions under the Rehabilitation Act in Virginia. Defendant gives great weight to the fact that Eastman is the only decision

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1. Section 51.5-40(b) of the Virginia Act sets forth a one (1) year statute of limitations: "An action may be commenced pursuant to this section any time within one year of the occurrence of any violation of rights under this chapter."

by a court in the Fourth Circuit to address the limitations issue as applied to the Rehabilitation Act and that it is, therefore, uncontradicted.[2]

Plaintiff argues that the decision is not legally supportable because the District Court overlooked the Supreme Court's mandate in Wilson, supra, and Goodman, supra, to the effect that federal law rather than stat law governs the characterization of a federal claim for statute of limitations purposes. Had the District Court properly characterized the Rehabilitation Act claim in Eastman according to federal law, plaintiff's argument continues, it would not have even had the Virginia Act among its choices for selecting a limitations period. With the Virginia Act outside the range of potential choices, plaintiff concludes that Rehabilitation Act claims are, on the whole, more analogous to personal injury actions than to any other types of actions and that the proper period of limitation is Virginia's two year personal injury limitation. Va. Code Ann. Section 8.01-243(A).

The defendant urges this Court to reject plaintiff's argument for a number of reasons. First, defendant falls back on the District Court opinion in Eastman and the fact that it is the sole application of a limitations period in a Rehabilitation Act case in Virginia. The defendant next argues that the concern over

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2. On appeal, the Fourth Circuit affirmed the District Court's decision in Eastman to grant the defendant college summary judgment on the Rehabilitation Act claim. In so affirming, however, the appellate court did not address the limitations issue relied upon by the District Court and instead affirmed on the basis that the relief sought by the plaintiff was unavailable under the Rehabilitation Act. The Court held that the relief issue "offers a single, comprehensive basis for our decision ... " Eastman, 939 F.2d 204, 295 (4th Cir. 1991). In addition, one member of the panel filed a one sentence concurring statement stating that he would affirm the District Court's decision on the basis of the limitations issue.

multiple periods of limitations which underscored the Supreme Court's decisions in Wilson and Goodman are inapplicable to claims arising under the Rehabilitation Act because it, in contrast to §1981 and §1983, is a relatively recent statute, narrowly and specifically drawn to limit its scope to claims of discrimination on the basis of handicap against recipients of federal funding. Finally, defendant argues that in the absence of a controlling authority concerning the appropriate characterization of a Rehabilitation Act claim, the fact that the Virginia Act is almost identical to the Rehabilitation Act in both its requirements and its remedies makes it the "most appropriate" limitations period provided by state law.

In Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978), the Fourth Circuit, in the contest of a §1983 action, was faced with a situation quite similar to that presented in the present case. In that case, in response to the Fourth Circuit decision in Almond v. Kent, 459 F.2d 200 (4th Cir. 1972) (Holding that all §1983 actions were to be grouped and valued with actions to redress personal injuries and that, therefore, Virginia's two (2) year personal injury statute of limitations was applicable), the Virginia General Assembly enacted an amendment to Virginia's personal injury statute of limitations specifically designed to shorten the period of limitations for §1983 actions from two (2) years to one (1) year. The District Court applied the one (1) year statute of limitations to the plaintiff's §1983 claims and dismissed them as time-barred. The Fourth Circuit reversed, declining to adopt the special limitation period on §1983 actions because, "[T]he determination of which limitation period would apply should not turn on armchair concepts of survivability of the common law or on the form of the action brought but should instead turn on the primary object of the litigation which is compensation for injury suffered by the person." Johnson, 582 F.2d at 1318. The court then went on to reason, alternatively, "... [t]here is no rational basis for

distinguishing between §1983 actions and actions for injury to the person in light of the purposes for which statutes of limitations are generally prescribed. These statutes are statutes of repose ... The facts to be proven, the witnesses to be called to testify, the evidence to be considered are generally the same for §1983 actions as for state actions brought to compensate for the personal injury underlying the deprivation of federal constitutional rights." Id. at 1319.

Section 504 of the Rehabilitation Act was modeled on Title VI of the Civil Rights Act. See School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987). Title VI, like Section 504, does not have a specific statute of limitations. In determining which state statute of limitations applies to Title VI actions, courts have looked to the statute of limitations used in §1981 and §1983 actions. See Chambers v.Omaha Public School Distr., 536 F.2d 222 (8th Cir. 1976); Baker v. Bd. of Regents of State of Kansas, 721 F.Supp. 270 (D.Kan. 1989); and Barcia v. Sitkin, 89 F.R.D. 382 (S.D.N.Y. 1981). The primary object of both Title VI and Rehabilitation Act claims, like §1981 and §1983 claims, is to compensate a party for the injury he has suffered due to discrimination. When viewed in this light, again like §1983 and §1983 claims, there is no rational reason for distinguishing between Title VI and Rehabilitation Act claims and action for an injury to a person for limitations purposes.

After a review of the pertinent law and the respective arguments of the parties, it is apparent to this Court that the decision upon defendant's motion to dismiss turns on the proper characterization of a claim under the Rehabilitation Act in Virginia. This Court is persuaded that under federal law, a claim under the Rehabilitation Act in Virginia is best characterized for statute of limitations purposes as a claim for a injury to a person and that, accordingly, the two (2) year statute of limitations prescribed in Va. Code. Ann. Section 8.01-243(A) applies to such a claim.

Plaintiff last applied for, and was denied, readmission to the Medical School in February of 1991. Plaintiff filed a suit in this case on April 23, 1992. Plaintiff's cause of action under the Rehabilitation Act, therefore, is timely filed under the two (2) year statute of limitations applicable to such actions in Virginia and the defendant's motion to dismiss is DENIED.

In the event that its motion to dismiss Count I was denied, defendant asked this Court to strike plaintiff's request for compensatory and punitive damages, as well as his jury demand, under Count I. See Fed.R.Civ.P.12(f). In light of both the Fourth Circuit's decision in Eastman and plaintiff's lack of opposition, the Court GRANTS defendant's motion to strike plaintiff's request for compensatory and punitive damages, as well as his jury demand under Count I.

B. Count II

Count II of plaintiff's complaint attempts to state a claim for breach of contract between plaintiff and the Medical School. Defendant moves this Court for a More Definite Statement with regard to Count II. After reviewing Count II as pleaded, the Court finds that plaintiff's allegations are conclusory and factually deficient, and the defendant's motion is therefore GRANTED. Plaintiff must, therefore, within eleven (11) days of the entry of this Order, file a more definitive statement which advised the defendant of the factual basis for the creation of a contract and of the policies and procedures alleged to constitute the terms of the contract in Count II. See Fed.R.Civ.P.12(e).[3]

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3. Defendant has also moved to strike plaintiff's claims for compensatory and punitive damages from Count II. Plaintiff, in his brief, denies claiming such damages in Count II. Plaintiff does agree, however, that defendant's argument that such relief is unavailable in claims for emotional distress arising from a breach of contract claim is "well taken." Since this Court has ordered plaintiff to make a more definitive statement with regard to Count II, it is not necessary to decide this motion at the present time.

CONCLUSION

Defendant's Motion to Dismiss Count I of plaintiff's complaint as time-barred is DENIED. Defendant's Motion to Strike Plaintiff's prayer for compensatory and punitive damages as well as trial by jury as to Count I of plaintiff's complaint is GRANTED. Defendant's Motion for a More Definitive Statement as to Count II of plaiNtiff's complaint is GRANTED. Finally, defendant's Motion to Strike plaintiff's claims for compensatory and punitive damages as to Count II is deferred pending the filing of the More Definitive Statement.

The clerk is directed to mail copies of this Order to all counsel of record.

It is so ORDERED.

Enter:

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United States District Judge

At Norfolk, Virginia
July 29th, 1992

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 24, 1993

No. 92-2275
CA-92-319

CHRISTOPHER WOLSKY,

Plaintiff-Appellee

v.

MEDICAL COLLEGE OF HAMPTON ROADS, formerly known as Eastern VA Medical Authority, formerly known as Norfolk Area Medical Center Authority

Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1981. Equal Rights Under The Law.

(a) All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983. Civil Action For Deprivation Of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988. Proceedings In Vindication of Civil Rights; Attorney' Fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity

with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, and shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 or 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. §722; Pub.L. 94-559, §2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, §205(c), Oct. 21, 1980, 94 Stat. 2330.

29 U.S.C. §794. Nondiscrimination Under Federal Grants and Programs; Promulgation of Rules and Regulations.

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any

proposed regulation shall be submitted to appropriate authorizing committee of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(Pub.L. 93-112, Title V §504, Sept. 26, 1973, 87 Stat. 394; Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987).

1. Section 51.5-40 of the Virginia Rights of Persons With Disabilities Act, provided in relevant part:

§51.5-40. Nondiscrimination under state grants and programs. - No otherwise qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving state financial assistance or under any program or activity conducted by or on behalf of any state agency. The Board for the Rights of Virginians With Disabilities shall promulgate such regulations as may be necessary to implement this section. Such regulations shall be consistent, whenever applicable, with regulations imposed under the federal Rehabilitation Act of 1973, as amended. (1985, c.421, §51.01-40; 1990, c. 458.)

§51.5-42. Discrimination against qualified persons with disabilities by educational institutions prohibited.

A. No public educational institution or private educational institution which is a recipient of state funds, or agent of either, shall deny admission to the institution, or full and equal access to and enjoyment of any of its educational or extracurricular programs, to an otherwise qualified person with a disability

who meets the requirements for admission to the institution or the programs, because of such disability.

B. This section shall not apply to any public or private educational institution which is subject to the requirements of §22.1-215 nor to any private elementary or secondary school, or college or university which is not a recipient of state funds. (1985, c. 421, §51.01-42.)

§51.5-46. Remedies. A. Any circuit court having chancery jurisdiction and venue pursuant to Title 8.01, on the petition of any person with a disability, shall have the right to enjoin the abridgement of rights set forth in this chapter and to order such affirmative equitable relief as is appropriate and to award compensatory damages and to award to a prevailing party reasonable attorney's fees, except that a defendant shall not be entitled to an award of attorney's fees unless the court finds that the claim was frivolous, unreasonable or groundless, or brought in bad faith. Compensatory damages shall not include damages for pain and suffering. Punitive or exemplary damages shall not be awarded.

B. An action may be commenced pursuant to this section any time within one year of the occurrence of any violation of rights under this chapter. However, such action shall be forever barred unless such claimant or his agent, attorney or representative has commenced such action or has filed by registered mail a written statement of the nature of the claim with the potential defendant or defendants within 180 days of the occurrence of the alleged violation. Any liability for back pay shall not accrue from a date more than 180 days prior to the filing of the notice or bill of complaint and shall be limited to a total of 180 days, reduced by the amount of other earnings over the same period.

C. The relief available for violations of this chapter shall be limited to the relief set forth in this section.

D. In any action in which the petitioner is represented by the Department for Rights of Virginians With Disabilities or the Attorney General's office, no attorneys' fees shall be awarded, nor shall the Department for Rights of Virginians With Disabilities have the authority to institute any class action under this chapter. (1985, c. 421, §51.01-46; 1990, c. 458)

Article 3.

Personal Actions Generally.

§ 8.01-243. Personal action for injury to person or property generally; extension in actions for malpractice against health care provider.

A. Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

B. Every action for injury to property, including actions by a parent or guardian of an infant against a tort-feasor for expenses of curing or attempting to cure such infant from the result of a personal injury or loss of services of such infant, shall be brought within five years after the cause of action accrues.

C. The two-year limitations period specified in subsection A shall be extended in actions for malpractice against a health care provider as follows:

1. In cases arising out of a foreign object having no therapeutic or diagnostic effect being left in a patient's body, for a period of one year from the date the object is discovered or reasonably should have been discovered; and

2. In cases in which fraud, concealment or intentional misrepresentation prevented discovery of the injury within the two-year period, for one year from the date the injury is discovered or, by the exercise of due diligence, reasonably should have been discovered.

However, the provisions of this subsection shall not apply to extend the limitations period beyond ten years from the date the cause of action accrues, except that the provisions of §8.01-229 A 2 shall apply to toll the statute of limitations in actions brought by or on behalf of a person under a disability. (Code 1950, § 8-24; 1954, c. 589; 1973, c. 385; 1977, c. 617; 1986, cc. 389, 454, 1987, cc. 294, 645, 679.)